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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BYRON GILLO, Defendant and Appellant.	A125218 (San Francisco County Super. Ct. No. 203078)

A jury convicted defendant of possessing methamphetamine for sale (Health & Saf. Code, § 11378); possessing cocaine for sale (Health & Saf. Code, § 11351) while armed with a firearm (Pen. Code, § 12022, subd. (c)); and being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)). The court sentenced defendant to an aggregate six-year prison sentence.

Defendant argues on appeal that (1) CALCRIM No. 3131, the standard jury instruction on being armed with a firearm in the commission of a crime, is inadequate; (2) trial counsel was ineffective in failing to request modification of CALCRIM No. 3131 (3) the trial court failed to adequately respond to the jury's request for clarification of the difference between the arming enhancement and the charge for being a felon in possession of a firearm; (4) there was insufficient evidence that defendant was armed with a firearm; and (5) defendant is entitled to additional conduct credit. We find no error concerning the matters asserted by defendant and affirm the judgment, with modification only to award additional conduct credit under a recent statutory amendment

that changed the formula for awarding credit during the time relevant here. (Pen. Code, § 4019.)

However, defendant also asked this court to review the sealed record on his pretrial motion for access to police personnel files to be sure defendant was not denied relevant discovery relating to any police misconduct. (Evid. Code, §§ 1043-1047; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) The trial court failed to provide an adequate record of the documents produced in connection with the *Pitchess* motion, thus necessitating conditional reversal of the judgment with directions to hold a new in camera review and to prepare a record sufficient for appellate review. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229; *People v. Guevara* (2007) 148 Cal.App.4th 62, 69.) If the trial court's inspection on remand reveals that no relevant information was improperly withheld, the trial court shall reinstate the judgment. Defendant will then be entitled to appeal from the judgment for the limited purpose of challenging the *Pitchess* findings (*People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 3), and we will have an adequate record to permit effective review of those findings.

I. FACTS

The police obtained a search warrant for defendant's person, vehicle, and residence. Seven narcotics officers in several vehicles arrived at the residence on San Francisco's Lilly Street at 3:45 p.m. on October 20, 2005 to execute the warrant. The officers did not see defendant's vehicle at the residence, so they parked their vehicles nearby and waited. Less than an hour later, defendant arrived at the residence in his car and parked in front of the building. Police officers approached defendant in his car and detained him. Other officers went to the residence to search it. The officers knocked and announced their presence and, receiving no response, walked inside. They found a man sitting in the living room and detained him. The apartment had a living room and kitchen near the entrance and, at the back, a bedroom and another room cluttered with miscellaneous things, including a locked metal cabinet, a drum set, male clothing, cups, and "[j]ust things all over the place." The police found drugs and a handgun in the metal

cabinet. The drugs and gun were recovered from locked containers stored in the cabinet, and the police opened those locks with keys taken from key rings found in defendant's pants pocket and car ignition.

The metal cabinet was about four feet high and five feet wide with two doors and some interior shelves. The doors were locked, but the officers who testified at trial could not recall if the cabinet had a key lock or a padlock. The police pried the lock open. Inside the cabinet, the police found a safe; a tan lock box; a black nylon bag containing two digital scales with white "crystal-like residue" on them; empty plastic bags; a spoon; and documents with defendant's name and Lilly Street address.[1] Several police officers testified at trial about the search. Not all could remember the type of lock on the safe, but Officer John Keane recalled that it was a combination lock. The police forced open the safe and found a gray metal lock box inside, secured with a padlock.

Around this time, Inspector Ted Mullin arrived with keys recovered from defendant. A key ring with 13 keys was taken from defendant's car ignition by one officer, and another key ring with the same number of keys was taken from defendant's pants pocket by another officer. The two officers gave the key rings to Inspector Mullin. Inspector Mullin was not present when the metal cabinet was forced open but arrived later with the keys.

The police used one of the keys from the key ring taken from the car ignition to open the padlock on the gray lock box removed from the safe. The lock box contained a yellow, hinged box. The yellow box contained substances packaged in plastic bags that appeared to be cocaine and methamphetamine. Testing later confirmed that there were four baggies of cocaine with a cumulative weight of 2.9 grams and four or five baggies of methamphetamine with a cumulative weight over 37 grams.

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[1] The documents consisted of several items: (1) an unopened envelope addressed to defendant at Lilly Street from a storage company postmarked October 18, 2005 (two days before the search) (2) an opened envelope addressed to defendant at Lilly Street from an individual; and (3) a receipt in defendant's name for motorcycle parts.

The police used one of the keys from defendant's pants pocket to open the key lock on the tan lock box removed from the metal cabinet. Inside was a loaded, operable .44 caliber revolver.

A narcotics officer testified that, in his opinion, defendant possessed the cocaine and methamphetamine for sale. The officer based his opinion on the following facts (1) the large quantity of methamphetamine, with an estimated street value of $2,000; (2) the packaging of the drugs in individual bags; (3) the presence of scales and a spoon useful for measuring drugs; and (4) the presence of a firearm, which drug dealers commonly have for protection from other dealers, the police, and people who might steal their drugs.

The defense called a single witness to testify at trial, defendant's friend Robert Doerr. Doerr testified that he stayed with defendant at the Lilly Street residence for "maybe a month, month and a half," from "sometime in August" to "sometime in September" 2005. The police search was conducted on October 20, 2005. Doerr said that he, while living at the apartment, never saw defendant with drugs or a gun but that others staying at the apartment had them. Doerr said defendant saw people coming to the apartment with drugs and guns, but he could not do anything to stop it. Doerr also said that defendant moved out of the apartment "like a week" after Doerr moved away in September 2005. On cross-examination, Doerr said defendant "was on the lease" but created "like a sublet type situation, or something" with another person when he moved away.

II. VERDICT AND SENTENCING

The jury convicted defendant of possessing methamphetamine for sale (Health & Saf. Code, § 11378); possessing cocaine for sale (Health & Saf. Code, § 11351) while personally armed with a firearm (Pen. Code, § 12022, subd. (c)); and being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).[2] The trial court found that defendant had prior convictions for second degree burglary and grand theft. The court

[2] Defendant stipulated to his status as a felon.

sentenced defendant to the three-year midterm for possessing cocaine for sale and an additional three years for the arming enhancement. (Health & Saf. Code, § 11351; Pen. Code, § 12022, subd. (c).) Concurrent sentences were imposed on the other counts. The court awarded custody credit of 90 days under Penal Code section 4019: 60 days for actual time spent in custody and 30 days for conduct credit.

III. DISCUSSION

As previously noted, defendant (through appointed counsel) argues on appeal that (1) CALCRIM No. 3131, the standard jury instruction on being personally armed with a firearm in the commission of a crime, is inadequate; (2) trial counsel was ineffective in failing to request modification of CALCRIM No. 3131; (3) the trial court failed to adequately respond to the jury's request for clarification of the difference between the arming enhancement and the charge for being a felon in possession of a firearm; (4) there was insufficient evidence that defendant was armed with a firearm; and (5) defendant is entitled to additional conduct credit. Defendant also asks that we review the sealed record on his pretrial motion for access to police personnel files to be sure defendant was not denied relevant discovery relating to police misconduct. (*Pitchess, supra,* 11 Cal.3d 531.) We conclude that the trial court failed to provide an adequate record of the documents reviewed on the *Pitchess* motion and must remand the matter for a new *Pitchess* in camera review and preparation of a proper record. We begin with a discussion of defendant's claims presented in his briefing on appeal and conclude with the *Pitchess* issue.

A. CALCRIM No. 3131 fully instructed the jury on the elements of the enhancement

Penal Code section 12022, subdivision (c) imposes an additional three-year prison term for anyone "personally armed with a firearm in the commission of" specified drug felonies. The Legislature enacted this provision " 'to deter persons from creating a potential for death or injury resulting from the very presence of a firearm at the scene of a crime.' " (*People v. Bland* (1995) 10 Cal.4th 991, 996 (*Bland*).) "[T]he Legislature drew a distinction between being *armed* with a firearm in the commission of a felony and *using*

a firearm in the commission of a felony, and it made firearm *use* subject to more severe penalties." (*Id.* at pp. 996-997, original italics.) "[A]rming under the sentence enhancement statutes does not require that a defendant utilize a firearm or even carry one on the body. A defendant is armed if the defendant has the specified weapon available for use, either offensively or defensively." (*Id.* at p. 997, italics omitted.) " '[A] firearm that is available for use as a weapon creates the very real danger it will be used.' [Citation.] Therefore, '[i]t is the availability—the ready access—of the weapon that constitutes arming.' " (*Ibid.*)

"Possessory drug offenses are continuing crimes that extend throughout a defendant's assertion of dominion and control over the drugs, even when the drugs are not in the defendant's immediate physical presence." (*Bland, supra,* 10 Cal.4th at p. 995.) Because drug possession is a crime that continues throughout the time that the defendant has possession of the unlawful drugs, it follows that Penal Code section 12022's arming enhancement applies "to a defendant who has been found guilty of felonious drug possession and who, at some point during the illegal drug possession, had [a firearm] available for use in furtherance of the drug offense." (*Id.* at p. 1001.) But "contemporaneous possession of illegal drugs and a firearm will satisfy the statutory requirement of being 'armed with a firearm in the commission' of felony drug possession only if the evidence shows a nexus or link between the firearm and the drugs." (*Id.* at p. 1002.) " '[T]he firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.' " (*Ibid.,* italics omitted, quoting *Smith v. United States* (1993) 508 U.S. 223, 238.)

Applying these principles, the California Supreme observed that, "[w]ith respect to felony drug possession, a defendant is armed 'in the commission' of that crime so long as the defendant had the firearm available for use in furtherance of the drug offense at some point during the defendant's possession of the drugs. Thus, by specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, [Penal Code] section 12022 implicitly requires both that the 'arming' take

place during the underlying crime and that it have some 'facilitative nexus' to that offense. Evidence that a firearm is kept in close proximity to illegal drugs satisfies this 'facilitative nexus' requirement: a firearm's presence near a drug cache gives rise to the inference that the person in possession of the drugs kept the weapon close at hand for 'ready access' to aid in the drug offense." (*Bland, supra,* 10 Cal.4th at p. 1002, italics omitted.)

"To summarize, when the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer (1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use to aid in the drug possession. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of [Penal Code] section 12022." (*Bland, supra,* 10 Cal.4th at pp. 1002-1003, italics omitted.)

In *Bland,* the defendant sat outside in a police car as the police searched his home and "retrieved from defendant's bedroom 17.95 grams of rock cocaine together with a scale, plastic baggies, and Pyrex containers, all items that are commonly associated with the sale or manufacture of cocaine base. In the same room, under defendant's bed, were several firearms, including an unloaded Colt AR-15 semiautomatic rifle." (*Bland, supra,* 10 Cal.4th at p. 1003.) The California Supreme Court concluded that "the rifle's close proximity to the drug cache, and its accessibility to defendant at any time while he possessed the illegal drugs, supported the jury's finding that defendant fell within the statutory prohibition of being armed with an assault weapon in committing the felony drug possession, thus subjecting him to the three-year sentence enhancement" under Penal Code section 12022. (*Ibid.*) The court found it "reasonable for the jury to infer from the proximity of the semiautomatic rifle to the drug cache that defendant had the

rifle available for his use to aid in the drug crime at some point during his felonious drug possession." (*Id.* at pp. 1003-1004.)

In accordance with these principles, the jury here was instructed with CALCRIM No. 3131, with no objection by defense counsel.[3] As read to the jury, the instruction stated: "If you find the defendant guilty of the crime charged in Count III [possessing cocaine for sale], you must then decide whether for that crime the People have proved the additional allegation that the defendant was personally armed with a firearm in the commission of that crime. [¶] A firearm is any device designed to be used as a weapon from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] A person is armed with a firearm when that person: [¶] 1. Carries a firearm or has a firearm available for use in either offense or defense; and [¶] 2. Knows that he or she is carrying the firearm or has it available for use. [¶] The People have the burden of proving each [allegation] beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

Defendant argues on appeal that CALCRIM No. 3131 is inadequate in speaking simply of "a firearm available for use" without instructing the jury that it must find a "nexus" between the firearm and the drug crime showing defendant's intended use of the firearm in the commission of the drug crime and precluding the possibility that the firearm's presence near the drugs was coincidental. Defendant's argument is foreclosed by clear California Supreme Court precedent that approved CALJIC No. 17.15 (which is substantially the same as CALCRIM No. 3131) and rejected the argument that the jury must be instructed to find a nexus between the presence of the firearm and the commission of the crime. (*People v. Pitto* (2008) 43 Cal.4th 228, 234 fn. 3, 238-240 (*Pitto*).)

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[3] Indeed, defense counsel expressly requested CALCRIM No. 3131, as did the prosecutor.

In *Pitto,* the high court reaffirmed that the substance of the arming enhancement under Penal Code section 12022, as *Bland* stated, is the firearm's " 'availab[ility] for use, either offensively or defensively.' " (*Pitto, supra,* 43 Cal.4th at p. 236, quoting *Bland, supra,* 10 Cal 4th at p. 997.) Close proximity of a firearm to drugs permits an inference of the firearm's availability for use in a drug crime. (*Pitto, supra,* at p. 237.) But the jury need not be explicitly instructed on the nature of this inference. (Bench Notes to CALCRIM No. 3131.) A standard jury instruction advising the jury of the principle that the firearm must have been available for use in the commission of the crime, as does CALJIC No. 17.15 (and CALCRIM No. 3131), is sufficient. (*Pitto, supra,* at pp. 234 fn. 3, 240.) A trial court has no sua sponte duty to instruct, beyond the provisions of the standard jury instruction, "that there must be a facilitative nexus between the possession of illegal drugs and a firearm." (*Id.* at p. 240.)

B. Trial counsel was not ineffective in failing to request modification of CALCRIM No. 3131

Defendant argues that if, as we have found, the trial court had no duty to instruct "on *Bland's* nexus requirement," then defense counsel should have requested modification of CALCRIM No. 3131 to include the requirement and was ineffective in failing to do so. We reject the argument. CALCRIM No. 3131 fully instructed the jury on the applicable law and no modification was necessary. We also fail to see how defendant would have been advantaged by instructing the jury that it could infer from the close proximity of the handgun to the drug cache that defendant had the gun available for use during commission of the drug crime. Such an instruction favors the prosecution and it is the prosecution, not the defense, that may request a special instruction on this issue. (Bench Notes to CALCRIM No. 3131.)

Defendant's claim that the instruction would have worked in his favor is difficult to comprehend. The claim seems to be that, had the jury been advised that close proximity of a gun to drugs raises an inference of gun use in commission of the drug crime, then the jury would have more intently explored that inference. Defendant thinks such exploration would have aided him because "there was no evidence that [defendant]

had control over the cabinet"—only the lock boxes inside the cabinet. Defendant notes that the cabinet was forced opened ("no key was used to open the cabinet") and from this fact concludes that "the lock box containing the gun was not capable of being reached seeing that [defendant] did not have a key to open the cabinet."

The argument, and indeed most of the arguments made by defendant on appeal, rest upon this mistaken reading of the record. Defendant's counsel asserts "there was no dispute that none of the 26 keys [defendant] walked around with contained a key to open the cabinet itself. Despite being in possession of a mass of keys—which the officers patiently tried on each of the lock boxes—their testimony was unanimous that the cabinet had to be forcibly pried open. The only reasonable inference from such facts is that none of the keys allegedly taken from [defendant] opened this cabinet." Counsel misunderstands the facts.

There were multiple police officers. Some officers detained and searched defendant outside the apartment while others began the search of the apartment. The officers inside the apartment reached the cabinet and forced it open. Only after they forced the cabinet open did the officer who received the keys taken from defendant's person and car ignition approach the cabinet. The testimony of Inspector Mullin, the officer with the keys, is clear on this point. The officers then used those keys to open the lock boxes stored in the cabinet and discovered a gun in one box and drugs in another. No effort to open the cabinet with one of defendant's keys was ever made because the cabinet had already been forced open before the officer with the keys arrived at the cabinet. Accordingly, one cannot infer that defendant did not have a key to the cabinet and thus had no access to the gun within it. When the facts are properly understood, the clear inference is that defendant *did* have access to the cabinet—his mail was found inside the cabinet as were two lock boxes for which he possessed keys. A modification of the jury instruction on the arming enhancement—focusing the jury's attention on defendant's access to the gun—would not have favored the defense. Defense counsel was not ineffective in failing to request such a modification.

C. The trial court adequately responded to the jury's request for clarification

The jury was instructed on the elements of the crime of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) and the separate sentence enhancement for being personally armed with a firearm in the commission of a drug crime (Pen. Code, § 12022, subd. (c)). (CALCRIM Nos. 2511, 3131.) During deliberations, the jury sent a note to the court requesting "clarification on the difference between the two firearm charges 12022 and 12021 (a)(1)." The court discussed the matter with the prosecutor and defense counsel and drafted a proposed written response. (Pen. Code, § 1138.) Defense counsel did not object to the proposal. The court sent the written response to the jury, which stated: "You are separately to consider: the charge in Count IV of possession of a firearm by a person prohibited due to a felony conviction, and, the allegation of being personally armed with a firearm as to the charge in Count III of possession for sale of a controlled substance."

Defendant now argues that the response was inadequate. Counsel's failure to object at trial forfeits the claim of error made here. (*People v. Roldan* (2005) 35 Cal.4th 646, 729, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22.) In any event, the court's response for clarification was sufficient.

Defendant argues to the contrary. Defendant maintains that the only substantive difference between the arming enhancement and the felon in possession of a firearm charge (aside from felon status, which was stipulated) was that the arming enhancement required a facilitative nexus—that the firearm was available for defendant's use to aid drug possession—and that the request for clarification called for that explanation. Defendant argues that "the court's response should have at least clarified that [] 'a person is armed with a firearm when that person [] has a firearm available for use in either offen[s]e or defense *during the commission of the charged crime.* (*Bland, supra,* [10 Cal.4th] at pp. 999-1000.)"

In our view, the court's response effectively did that. The court explained that the jury must separately consider the arming enhancement and the felon in possession of a firearm charge, and thus referred the jury back to the instructions on those issues. The

arming enhancement instruction advised the jury that, "[i]f you find the defendant guilty of the crime charged in Count III [possessing cocaine for sale], you must then decide whether for that crime the People have proved the additional allegation that the defendant was personally armed with a firearm *in the commission of that crime*." (Italics added.) The instruction further advised the jury that "[a] person is armed with a firearm when that person: [¶] 1. Carries a firearm or *has a firearm available for use in either offense or defense*; *and* [¶] 2. *Knows that he* or she is carrying the firearm or *has it available for use*." (Italics added.)

Exposition beyond the provisions of the standard jury instruction was unnecessary to respond to the jury's inquiry. The trial court "has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] [But] [t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.] The trial court was understandably reluctant to strike out on its own. But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, italics omitted.)

Here, the trial court told the jury that it must separately consider the charge for possession of a firearm by a felon and the allegation of being personally armed with a firearm in the commission of the drug offense. The court's response referred the jury back to the instructions already given and that response was adequate because the original instructions were full and complete.

Moreover, there was no possible prejudice from the court's failure to expound upon the instructions. Defendant maintains that the jury probably "mistook the [Penal Code] section 12022 enhancement as requiring no more than possession of a weapon."

But that possibility was precluded by the original instructions, which clearly stated that the People must prove that the defendant was personally armed with a firearm "in the commission of" the crime of possessing drugs for sale and further explained that "[a] person is armed with a firearm when that person: [¶] 1. Carries a firearm or has a firearm available for use in either offense or defense; and [¶] 2. Knows that he or she is carrying the firearm or has it available for use." The instructions adequately explained that the enhancement required more than possession of a firearm; it required that the firearm have been available for use in the commission of the drug offense. As we discuss shortly, there was compelling evidence of defendant's guilt on this point.

D. Substantial evidence supports the jury's finding that defendant was armed with a firearm in the commission of the drug offense

Defendant argues that there is insufficient evidence to support the jury's finding that he was armed with a firearm while possessing cocaine for sale "because the prosecution failed to establish a purposeful 'nexus' between the gun and the narcotics in that there was no evidence that [defendant] himself had placed the gun in close proximity to the narcotics or that he had 'ready access' to it." Defendant's claimed lack of access to the gun is based on the same misreading of the record noted above—defendant says that none of the keys taken from his possession could open the locked cabinet containing boxes with the gun and drugs so he had no access to the cabinet and hence no access to the gun inside the cabinet.

As explained earlier, the cabinet was forced open without ever checking to see if any of defendant's keys fit the lock. Only after the cabinet was pried open did an officer with keys retrieved from defendant's person and car ignition approach the cabinet. Those keys were then used to open lock boxes stored inside the cabinet. One box contained drugs, and another box contained a handgun. The cabinet also stored a black nylon bag containing two digital scales with white "crystal-like residue" on them, empty plastic bags and a spoon. Also inside the cabinet were various documents bearing defendant's name and the Lilly Street address, including correspondence addressed to defendant at Lilly Street from a storage company postmarked October 18, 2005, just two days before

the search. This evidence strongly supports the inference that defendant had access to the cabinet— recent mail addressed to him was found inside the cabinet as were two lock boxes for which he possessed keys. The evidence also supports the inference that defendant had the gun available for use in furtherance of the drug offense. The gun was in close proximity to a large quantity of drugs and drug paraphernalia. All items were inside the same cabinet at defendant's residence.

The evidence of defendant's possession of a firearm in the commission of a drug offense is at least as strong as the evidence in *Bland, supra,* 10 Cal.4th at p. 1003. In *Bland,* a police search retrieved from defendant's bedroom 17.95 grams of rock cocaine together with a scale, plastic baggies, and Pyrex containers. In the same room, under defendant's bed, were several firearms, including an unloaded semiautomatic rifle. (*Ibid.*) The California Supreme Court found it "reasonable for the jury to infer from the proximity of the semiautomatic rifle to the drug cache that defendant had the rifle available for his use to aid in the drug crime at some point during his felonious drug possession." (*Id.* at pp. 1003-1004.) Likewise, it was reasonable for the jury here to infer from the proximity of the loaded handgun to the drug cache that defendant had the gun available for use to aid the drug crime. If anything, the evidence is stronger here than in *Bland* because defendant's dominion and control over both the firearm and the drugs was demonstrated by his possession of keys that unlocked the boxes containing the firearm and drugs. Substantial evidence supports the jury's finding that he was armed with a firearm while possessing cocaine for sale.

E. Defendant is entitled to additional conduct credit

Defendant was sentenced on May 18, 2009. Defendant had served 60 days in custody prior to sentencing and was awarded credit for time served toward his prison sentence. The court also awarded good conduct credit of 30 days. At the time of sentencing, the operative statute provided for two days of conduct credit for every four days of custody unless the inmate failed to perform assigned work or abide by the facility's rules and regulations. (Pen. Code, § 4019, subds. (a)(4), (b), (c), (f), as amended by Stats. 1982, ch. 1234, § 7, p. 4553.) Effective January 25, 2010, Penal Code

section 4019 was amended to increase conduct credit by providing for two days of credit for every two days of custody (with exceptions not relevant here). (Pen. Code, § 4019, subds. (a)(4), (b)(1), (c)(1), (f), amended by Stats. 2009-2010, Ed Ex. Sess., ch. 28, § 28.)

Defendant maintains that the amendment applies retroactively to individuals, like himself, whose judgments have not yet become final. The People do not deny that defendant is entitled to an additional 30 days conduct credit if the amendment to Penal Code section 4019 applies retroactively. But the People argue that the amendment does not apply retroactively.

The retroactivity question has split the court of appeal and is currently pending before the California Supreme Court. (*People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.) Divisions of this District Court of Appeal have taken the position that the amended statute *does* apply retroactively, as a statute lessening punishment. (*People v. Norton* (2010) 184 Cal.App.4th 408, 415-418, review granted Aug. 11, 2010, S183260; *People v. Landon* (2010) 183 Cal.App.4th 1096, 1105-1108, review granted June 23, 2010, S102808.) We adopt that position here.

F. The record on the Pitchess *motion is inadequate and requires remand*

Defendant filed a pretrial motion in February 2008 for discovery of the personnel records of several police officers involved in his arrest. (Evid. Code, § 1043.) Defendant claimed that officers beat him without provocation and lied in reporting that defendant had a key to the lock box containing drugs. Pursuant to stipulation, defendant limited his discovery request to records of citizen complaints of fabrication of evidence by Officers Lebanowski and Keane, and complaints of either fabrication of evidence or use of excessive force by Officers Etcheber and Nastari. The police department searched the officers' personnel records, produced documents that were possibly responsive to the request, and submitted those documents to the trial court for inspection and evaluation of their relevancy. Commissioner Frank Drago reviewed the documents. The transcript of the in camera hearing by Commissioner Drago is fewer than two pages long and contains the following statement concerning the document inspection: "I've been provided with a declaration under penalty of perjury from Officer [John] Hart SFPD legal department

outlining the search that was conducted to comply with the request. I've reviewed all documents provided to me using the case log sheet attached to the protective order. I've listed each document by number. I've written the word yes next to any document that is relevant to the stipulated categories [and] the word no next to documents that are not relevant. I've made a copy of the log and I'm placing it in an envelope with the caption of the case[,] today's date[,] name of the court reporter and my signature. [¶] I order that the envelope be filed in the court file to remain sealed until further order. I'm also dating and signing the protective order and will return the stipulation and order along with all documents to Police Legal today."

On appeal, defendant asks us to review the sealed record and to determine whether the trial court properly exercised its discretion in returning the personnel records to the police department rather than ordering disclosure. The People do not oppose defendant's request. Customarily, police personnel records reviewed by the trial court are made part of the confidential record, and appellate courts independently review the records. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330.) Here, the transcript indicated that all documents were returned to the police department but that a document log of some kind was prepared. On September 2, 2010, this court requested that the record on appeal be augmented with the referenced log pertaining to the *Pitchess* in camera review of documents. In response to that request, the San Francisco Superior Court (SFSC) sent us a log from a different *Pitchess* motion filed by defendant concerning other officers that was handled by a different commissioner. That log contained columns of numbers under several officers' names (apparently signifying document pages) with the words yes and no next to the numbers. While similar in form to the log referenced by Commission Drago, the log obviously related to a different motion and our court clerk therefore contacted the SFSC criminal clerk to inquire about Commissioner's Drago's log. We were informed that the forwarded records were the only documents concerning a *Pitchess* motion. This later proved to be incorrect.

On September 20, 2010, we issued an order to augment/settle the record on appeal and did receive additional (but inadequate) materials. In our augmentation order, we

directed the trial court to "hold a hearing either to augment and or settle the record in SFSC docket No. 203078 with a record of the documents that Commissioner Drago examined in camera on April 2, 2008, pertaining to Officers Lebanowski, Keane, Etcheber, and Nastari." (Boldface omitted.) We informed the trial court that the record provided "must be sufficient to permit meaningful appellate review, and thus shall include either a copy of the actual personnel records examined by the trial court, or, if they are voluminous, a list of verbal description of the documents examined. (*See People v. Mooc* [, *supra*,] 26 Cal.4th [at p.] 1229.)" We noted that *detailed* descriptions were necessary should the documents themselves be unavailable, and asked for clarification as to whether any personnel documents were ordered disclosed by Commissioner Drago. We also informed the trial court that the log referenced by Commission Drago "would *not* suffice in and of itself for meaningful appellate review, if it is similar to the one provided previously to this court, as that log merely contained a list of document numbers and an indication of whether the commissioner found each to be 'relevant.' " We explained that "[t]his court must have either a copy of the actual documents reviewed, or a detailed description of each, in order to determine whether the commissioner's findings of 'relevancy' were correct" and must have a clear indication of whether any documents deemed "relevant" were either disclosed or withheld.

On October 7, 2010, the SFSC responded to our order by sending us a five-page document consisting of a cover page, a page indicating the categories of documents sought (fabrication and excessive force), a log similar in form to the one previously provided to this court (listing document numbers with the words yes and no next to the numbers), and Officer Hart's declaration as custodian of records explaining his method for locating potentially responsive documents. The log appears to be the log referenced by Commission Drago that we sought, as it concerns the officers who were the subject of the *Pitchess* motion on review here. The log, however, is deficient for the reasons we cautioned SFSC about in our augmentation order. Without a copy of the actual documents reviewed, or a detailed description of them, we are unable to determine whether the commissioner's findings of relevancy were correct. We are also unable to

determine whether any documents deemed relevant were disclosed or withheld. Commissioner Drago, in the transcript of the proceedings, stated that he wrote "the word yes next to any document that is relevant to the stipulated categories [and] the word no next to documents that are not relevant." The word yes appears next to several document numbers in the log. But Commissioner Drago also said that he returned "all documents to Police Legal," without any indication of whether copies of the "relevant" documents were produced to defendant. On this record, it is impossible to determine whether any documents were produced to defendant.

SFSC has failed to augment or settle the record as necessary and is apparently unable to do so. Our augmentation order explained that "[t]his court must have either a copy of the actual documents reviewed, or a detailed description of each, in order to determine whether the commissioner's findings of 'relevancy' were correct." SFSC's single page log listing document numbers without any description of the documents or indication of their contents is insufficient. Accordingly, we conditionally reverse the judgment and remand for a new *Pitchess* in camera review. (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1231; *People v. Guevara, supra,* 148 Cal.App.4th at p. 69.) The trial court shall limit its review to those documents provided to Commissioner Drago for inspection that are listed in his log. But either a copy of the documents themselves or a *detailed* description of the documents must be made part of the confidential record. As we previously advised in our augmentation order, "[i]f copies of the actual personnel records are not provided and a list or verbal description is instead provided, that list or verbal description shall contain a detailed description of each document reviewed by the trial court, including the factual allegations contained therein, and the results of any investigation of the matter." The court shall also indicate whether any documents deemed relevant were withheld, and the basis for withholding the documents. If the trial court's inspection on remand reveals that no relevant information was improperly withheld, the trial court shall reinstate the judgment. Defendant will then be entitled to appeal from the judgment for the limited purpose of challenging the *Pitchess* findings

(*People v. Gaines, supra,* 46 Cal.4that p. 181, fn. 3), and we will then have an adequate record to permit effective review of those findings.

IV. DISPOSITION

The judgment is conditionally reversed. The case is remanded to the trial court with directions to hold a new in camera hearing on defendant's *Pitchess* motion in conformance with the procedures described in this opinion. The court shall make a proper record of the documents reviewed, either retaining a copy of the documents or preparing a detailed description of the documents that will permit appellate evaluation of all documents produced for inspection. If the trial court finds that discoverable documents were not produced, the documents shall be produced and the court shall conduct further proceedings as necessary. If the court finds that all discoverable documents were produced, the court shall reinstate the judgment as modified to award conduct credit of 60 days for a total of 120 days of presentence credit, amend the abstract of judgment to reflect the modified credit award, and deliver a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.